IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6715 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FORUM OF RETIRED OFFICERS/EMPLOYEES OF GUJARAT
STATE FINANCIAL CORPORATION

Versus

STATE OF GUJARAT

Appearance:
1. Special Civil Application No. 6715 of 2002
MRS KETTY A MEHTA for Petitioner No. 1-2
MR ND GOHIL, ASSTT.GOVERNMENT PLEADER for Respondent No. 1-2
MR KM PATEL for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 29/09/2004

ORAL JUDGEMENT

In this petition the employees, who have retired

from service of the Gujarat State Financial Corporation, have sought a writ of mandamus against the respondent No.3 i.e. Gujarat State Financial Corporation (hereinafter referred to as "the Corporation"), directing the Corporation to implement the pension scheme as per its Resolution dated 27.1.1994, with effect from 1.4.1993. It is prayed that the scheme be implemented without any approval from the State Government and in case the approval of the State Government is necessary, the State Government be directed to give such an approval to the Corporation for implementation of the pension scheme in favour of all the employees who have retired with effect from 1.4.1993. The facts leading to the present petition need to be noted at the outset.

2. The petitioner No.1 claims to be the forum of retired officers/employees of the Gujarat State Financial Corporation, whereas petitioner No.2 is a joint secretary of the petitioner No.1 forum. It is the case of the petitioners that they are espousing the cause of the employees of the respondent No.3 Corporation, some of whom have retired after 1.4.1993. The petitioners have stated that the respondent No.3 is formed under the provisions of the State Financial Corporation Act, 1951 (hereinafter referred to as "the said Act"). It is pointed out that under Section 3(1) of the said Act, the Corporation is a body corporate having perpetual succession and a common seal. It is on the basis of the provisions of the Act that the petitioners have contended that the respondent No.3 Corporation is a State within the meaning of Article 12 of the Constitution of India.

3. The case of the petitioners is that the respondent No.3 Corporation in its Board meeting held on 27.1.1994, had resolved to introduce a pension scheme in the Corporation for the employees of the Corporation, to be brought into force with effect from 1.4.1993 on the lines of the pension scheme prevailing in the State Government. The petitioners have contended that the said Resolution was passed in the meeting of the board on 27.1.1994 and that therefore the decision to introduce the pension scheme with effect from 1.4.1993 was taken by the Corporation. The petitioners have further stated that the decision of the Corporation was in consonance with the recommendations of the Fourth Pay Commission report in which it is provided that all Government servants who are in service as on 1.1.1986 should be brought over to the pension scheme from that of contributory provident fund scheme, unless it is objected to by the Government servant concerned.

4. The petitioners have also stated that in the resolution dated 27.1.1994, it was further resolved to introduce pension scheme subject to approval/concurrence of the State Government and IDBI. In the said resolution it is also provided that the Managing Director is authorised to take necessary action to implement the scheme and to get necessary approval/concurrence of the State Government and IDBI.

5. The petitioners have further stated that though members of the forum were entitled to receive pension under the pension scheme with effect from 1.4.1993, the pension scheme was not implemented by the respondent No.3. The retired employees therefore created the forum of retired officers/employees of the Corporation to ventilate their grievances. It is also stated that the forum had represented before the Managing Director of the Corporation by its representation dated 23.4.2001 that the resolution to implement the pension scheme is not implemented though other financial institutions such as Reserve Bank of India, Industrial Development Bank of India, Life Insurance Corporation of India etc. have adopted the pension scheme. The petitioners have further stated that it was also pointed out to the respondent No.3 that the Government has power only with respect to the matters pertaining to policy under the provisions of the said Act, whereas fixation of grade, creation of posts, matters related to emoluments, pension etc. are not policy matters and that therefore the Corporation has a right to implement the scheme for pension without waiting for the approval of the State Government. It is stated that the petitioners had thereafter also made representations on 17th September, 2001, 9th October, 2001 and 11th October, 2001 and given details of the pension scheme adopted by other Corporations. It is however, stated that no action was taken by the respondent No.3 in response to the representations made by the petitioners. It is further stated that thereafter also representations were made by the petitioners without any response from the respondents.

6. The petitioners therefore have approached this Court by filing the present petition and seeking direction against respondent No.3 to implement the pension scheme as per resolution dated 27.1.1994, with effect from 1.4.1993.

7. Primarily the foundation of the present petition is that the respondent No.3 has erred in providing in the resolution dated 27.1.1994 that the pension scheme shall be introduced subject to the approval or concurrence of

the State Government and/or Industrial Development Bank of India. It is contended that no such condition was necessary or even permissible to be imposed. The petitioners have relied upon several provisions of the said Act, to which this Court will advert attention at a slightly later stage, to canvass the argument that the resolution dated 27.1.1994 could not have validly contained a condition that the pension scheme will be introduced subject to approval/concurrence of the State Government and/or IDBI. It is contended that the State Government has no power under the said Act to grant any such approval/concurrence and it was not possible for the respondent No.3 to seek any such approval or the concurrence either from the State Government or from the IDBI.

8. The respondent No.3 had filed an affidavit dated 3rd September, 2002, opposing the petition and raised number of contentions. It is stated inter-alia in the said affidavit by the respondent No.3 that the Board of Directors of the Corporation had passed a Resolution dated 27.1.1994, resolving to introduce Pension Scheme for its employees, but the same was subject to the approval/concurrence of the State Government and the IDBI. It is stated that the Resolution has not been implemented as the State Government has not granted approval to the proposal for introduction of the Pension Scheme, nor has the IDBI granted such an approval. It is contended that the Corporation under the provisions of the said Act, was required to obtain such an approval/concurrence especially in view of Section 48 of the said Act. It is stated that the IDBI had not granted the concurrence and advised the Corporation to approach IDBI only after the State Government grants approval to the said proposal. It is further contended that the State Government has not communicated its approval and therefore, the conditions subject to which the Board of Directors of the respondent No.3 had passed the resolution not having been satisfied, the Pension Scheme cannot be implemented. It is further stated that with passage of time, the financial condition of the Corporation has changed and the Corporation has been incurring huge losses and is not in a position to bear the burden of the pension scheme. The respondent No.3 has also given figures with respect to its losses, which according to the said affidavit has mounted to Rs. 100.80 crores for the year 2000-2001; a further loss of Rs. 126.85 crores was suffered in the financial year 2001-2002 and for the part of the financial year 2002-2003 for which provisional figures were available also, the picture did not improve. It is therefore,

stated that since the pension scheme is likely to put recurring burden on the respondent No.3 if introduced, the respondent No.3 will not be in a position to weigh the burden having regard to the heavy losses incurred by it in the recent years. It is therefore suggested that having regard to the changed situation, the Corporation is not in a position to implement the pension scheme.

8.1 In the affidavit in reply the respondent No.3 has also raised objection against retired employees who have retired and accepted contributory provident fund benefits without any protest, from approaching this Court seeking implementation of the pension scheme.

8.2 During the pendency of the petition, the respondent No.3 had passed a fresh Resolution dated 23.10.2002, by which the Corporation had resolved to revoke the earlier Resolution dated 27.1.1994, since the conditions of approval/concurrence from the State Government and IDBI had not been satisfied. It may be noted that the petitioners had amended the petition to bring on record the said resolution and had also taken by way of amendment, detailed grounds in the petition in support of their contentions that irrespective of the subsequent resolution dated 23rd October, 2002, those employees who were in service on 1.4.1993 cannot be deprived of the benefits of the resolution dated 27.1.1994 and the consequential benefits of the pension scheme which was to be implemented with effect from 1.4.1993.

8.3 The respondent No.3 had filed an additional affidavit dated 18.11.2002, through which the subsequent resolution dated 23rd October, 2002 was placed on record.

8.4 Yet another affidavit dated 24th September, 2004 came to be filed by the respondent No.3, in which it is stated inter-alia that the respondent No.3 had introduced a provident fund scheme through the Gujarat State Financial Corporation Employees' Provident Fund Regulation, 1961. It is stated that the said Regulations have been framed in exercise of power under Section 48 of the said Act and were framed with a previous sanction of the State Government and in consultation with the Reserve Bank of India, as required under Section 48 of the Act. The respondent No.3 in the said affidavit has further stated that similarly, gratuity payable to the employees is regulated by the Gujarat State Financial Corporation (Payment of Gratuity to its Employees) Regulations 1964, which Regulations were also framed in exercise of powers under Section 48 of the Act and with the previous

sanction of the State Government and in consultation with Reserve Bank of India. It is further stated that for appointment, promotion, discipline and appeal, penalties etc. of the employees of the Corporation, Regulations called "Gujarat State Financial Corporation (Staff) Regulations, 1961 have been framed in exercise of powers under Section 48 of the said Act with previous sanction of the State Government and in consultation with Reserve Bank of India. It is therefore, suggested that for introduction of the pension scheme, framing of Regulations under Section 48 of the said Act would have been necessary. It is submitted that for switching over from Contributory Provident Fund Scheme to Pension Scheme, modifications in the existing Provident Fund Regulations would have been necessary.

9. The State Government has filed an affidavit in reply dated 3.12.2002 and supported the stand of the respondent No.3. It is stated that the Pension Scheme of the respondent No.3 required the Government approval and only if the Finance Department and other Administrative Department of the Government grant such an approval, the Pension Scheme could be introduced. The affidavit-in-reply also details the various stages through which the proposal of the respondent No.3 seeking to implement the Pension Scheme for its employees had moved. It is further suggested in the affidavit of the State Government that the Pension Scheme could not have been implemented without the sanction of the Government, as according to the affidavit, the powers of the Corporation under Section 48 of the Act are bridled with a condition that the Regulations can be made only after consultation with the Industrial Development Bank of India and with the previous sanction of the State Government.

Date: 30th September, 2004.

10. The petitioners have filed rejoinders to meet with the averments made by the respondents in their affidavits. The petitioners have in the rejoinder affidavit dated 18th September, 2002, stated that the employees had been raising the demand for Pension Scheme through several representations and continued their demand all through out. They have therefore, denied the contention of the respondents that the petition suffers from delay and laches. Besides reiterating the stand that no approval of the Government was necessary as envisaged in the Resolution dated 27.1.1994, the petitioners have also sought to meet with the question of financial constraints as posed by the respondent No.3 by giving certain figures with respect to the possible

financial burden on account of introduction of the pension scheme as envisaged in the Resolution dated 27.1.1994. The petitioners have also in the said rejoinder affidavit averred that the financial condition of the respondent Corporation at the relevant time in the year 1994 when the Pension Scheme was sought to be introduced, was sound.

10.1 The petitioners have also filed another affidavit-in-rejoinder dated 28th September, 2004, and contended inter-alia that to formulate the Pension Scheme, it was not necessary to frame Regulations under Section 48 of the said Act. The petitioners have stated that large number of service conditions of the employees of the Corporation are governed by executive instructions and not by any Regulations framed under the Act. It is also contended that in so far as the existing employees of the Corporation are concerned, an option was to be given whether to continue to be governed by the Contributory Provident Fund Scheme or to switch over to the Pension Scheme. On the basis of these averments it is sought to be projected that the Pension Scheme could have been introduced without having recourse to framing of Regulations under Section 48 of the said Act.

10.2 In light of the above pleadings, the learned Counsel for the petitioners has raised following contentions:-

(a) That by resolution dated 27.1.1994, the respondent No.3 Corporation has already brought into existence a Pension Scheme. It is the contention of the learned Counsel for the petitioners that the condition of seeking approval/concurrence of the State Government and Industrial Development Bank of India was an invalid condition contained in the Resolution dated 27.1.1994 and that therefore, a validly framed Pension Scheme had already come into existence upon adoption of the Resolution to that effect by the Board of Directors of the Corporation in its meeting held on 27.1.1994;

(b) That having introduced the Pension Scheme as mentioned above, it was not possible for the respondents to withdraw the same on the ground of financial constraints as is sought to be done by the subsequent Resolution dated 23rd October, 2002;

(c) That it is not born out from the record that till

the year 1999-2000 there were any financial difficulties faced by the respondent No.3 Corporation to permit the Corporation to withdraw the Pension Scheme. It is submitted that in fact till the year 1999-2000, the Corporation was making profit;

(d) That the Pension Scheme cannot be withdrawn with retrospective effect and the Pension Scheme having been introduced by Resolution dated 27.1.1994, even if subsequent withdrawal thereof by Resolution dated 23rd October, 2002 is valid, the same cannot operate retrospectively;

(e) That the decision to withdraw the Pension Scheme by the subsequent Resolution dated 23rd October, 2002, suffers from legal malafides since the said Resolution was passed during the pendency of the petition and even in the first reply filed by the respondent No.3 on 3rd September, 2002, it is not revealed that the Corporation is considering withdrawal of the earlier Resolution dated 27.1.1994;

10.3 In support of her contention, learned Advocate for the petitioners has relied on several decisions to which mention may be made at this stage.

10.4 Placing reliance on the decision of the Division Bench of the Rajasthan High Court dated 5th September, 1988 passed in Civil Writ Petition No. 669 of 1988, the learned Counsel has submitted that the question of grant of pension is not a policy decision and the State Government therefore, in exercise of powers under Section 39 of the said Act was not competent to issue any instructions to the Corporation. She submits that the above decision of the Rajasthan High Court was carried in appeal before the Hon'ble Supreme Court and the Special Leave Petition was dismissed.

10.5 The learned Counsel for the petitioners also placed reliance on the decision of the learned Single Judge of the Karnataka High Court, in the case of Dr. Y.B. Yalwar Vs. State of Karnataka & ors. reported in II (1997) BC 265, in which it was held that the State Government cannot interfere with discretion of the Corporation regarding payment of salary to its employees and no approval of the State Government is necessary for granting special pay to the employees.

10.6 Relying upon the Division Bench judgement of this

High Court dated 31st July, 2001, passed in Letters Patent Appeal No. 788 of 1998 in Special Civil Application No. 3635 of 1982, in the case of State of Gujarat Vs. Kusumben E. Borasada, the learned Counsel for the petitioners has submitted that financial constraints cannot be a valid ground of defence to deny the pensionary benefits to the employees. For the same purpose, learned Counsel for the petitioners has also relied on the decision of the Division Bench of this High Court dated 10.3.2004 passed in Letters Patent Appeal No. 1134 of 1997 in Special Civil Application No. 11071 of 1993 in the case of Karshanbhai K. Rabari Vs. State of Gujarat. For the very same purpose, the Counsel for the petitioners has also relied on the decision of the learned Single Judge of this High Court in the case of Gujarat State Khadi Gramodhyog Board Pensioners' Association Vs. Gujarat State Khadi Gramodhyog Board, reported in 2004 (1) GLH p.18. In support of the same contention, reliance was also placed on the decision of this Court in Deva Gova Vs. Dist. Panchayat, reported in 2004 (2) GLH 273.

11. Appearing for the respondent No.3 Corporation, learned Counsel Mr. K.M. Patel has raised certain preliminary objections to the maintainability of the present petition. Firstly, he submitted that the petition in the present form is not maintainable since the petitioner No.1 is an unregistered Association and petitioner No.2 though a retired employee of the respondent No.3 Corporation is joined as a Joint Secretary of the petitioner No.1 Association.

11.1 Secondly Learned Counsel Mr. Patel has also contended that the petition suffers from delay and laches since the Resolution in question was passed as far back as in January, 1994 and no steps have been taken either to seek its implementation or to challenge the condition of approval/concurrence of the State Government and IDBI found in the said Resolution by the petitioners till filing of the petition in the year 2002.

11.2 Thirdly Learned Counsel Mr. Patel has contended that the employees concerned have acquiesced in the situation and given up their right by accepting full and final settlement of their Contributory Provident Fund dues upon retirement and that they therefore now cannot agitate the question of applicability of the Pension Scheme to them. In this regard, he also submitted that large number of employees have accepted voluntary retirement pursuant to a scheme circulated by the Corporation and such employees now cannot claim

pensionary benefits.

11.3 Besides raising the above preliminary contentions, learned Counsel Mr. Patel further contended that by merely passing Resolution dated 27.1.1994, the Pension Scheme was not brought into effect. He submits that in the said Resolution itself it was clearly envisaged that the Pension Scheme will be brought into effect after approval/concurrence of the State Government and Industrial Development Bank of India. He therefore, submits that when admittedly such an approval was not granted by the Government, the Pension Scheme cannot be treated to have been brought in to existence.

11.4 Learned Counsel Mr. K.M Patel has further submitted that when the Pension Scheme was never implemented, it was always open for the respondent No.3 Corporation to withdraw the same subsequently by passing a proper Resolution taking in to account subsequent developments.

11.5 Counsel for the respondent No.3 has also submitted that formation of the Pension Scheme is a policy decision and no direction can be given by the Court for formulating such a policy. In this regard he has also submitted that financial capacity of the employer to weigh the burden of a Pension Scheme is a relevant consideration which is required to be taken in to account and if the Corporation has, on account of its financial condition, decided not to implement the Pension Scheme, it would not be possible for this Court to issue a mandamus directing the Corporation to formulate such a scheme regardless of its financial condition.

11.6 In support of his contention regarding delay and laches, learned Counsel Mr. Patel has relied on the decision of the learned Single Judge of this Court dated 1.12.2000, passed in Special Civil Application No. 607 of 1992 decided in the case of H.C. Mehta Vs. Managing Director and submitted that the petition should be rejected only on the ground of delay. On the ground of delay Mr. Patel also relies on the decision of the Hon'ble Supreme Court, reported in 2000-II LLJ p.202 (Narayan Singh Solanki V. Union of India & ors).

11.7 In support of his contention regarding estoppel, waiver and acquiescence, learned Counsel for the Corporation has relied on the decision of the Hon'ble Supreme Court, reported in 2001-I LLJ 604 (State of Orissa & anr. Vs. Prativa Ghosh and anr.) In support of the same contention, he has also sought to place reliance

on the decision of the Hon'ble Supreme Court reported in 2002-III CLR 133 (E. Hill & Company Ltd. V. State of U.P & ors.).

11.8 Relying on the decision of the Hon'ble Supreme Court reported in (2003) 5 SCC 163 (A.K. Bindal & another Vs. Union of India and ors.), Mr. Patel has submitted that those of the employees who accepted voluntary retirement, cannot now turn around and claim the benefits of pension scheme also.

11.9 Relying on the decision of the Hon'ble Supreme Court in the case of All India Reserve Bank Retired Officers Association and others Vs. Union of India, reported in AIR 1992 SC 767, learned Counsel Mr. Patel has submitted that financial implication is a valid consideration and the capacity or otherwise of the employer to absorb the financial burden cannot be ignored.

11.10 For the same argument, learned Counsel for the Corporation has also placed reliance on the decision of the Hon'ble Supreme Court in the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and ors. reported in AIR 1992 SC 789. In support of the very same contention, reliance is also placed on the Division Bench judgement of this High Court in the case of Abad Dairy Vs. Manjibhai Dhanjibhai, reported in 2000 (3) GLH 409.

11.11 Referring to the decision of the Hon'ble Supreme Court in State of U.P Vs. U.P. University Colleges Pensioners' Association reported in AIR 1994 SC 2311, the learned Counsel for the Corporation has submitted that whether to implement a pension scheme or not is a policy decision and it is not open for the Court to interfere with such a decision of the employer. He has also referred to the decision of the Hon'ble Supreme Court in the case of Sate of Maharashtra and ors. Vs. Dr. Shri Hari Shankar Vaidhya, reported in AIR 1997 S.C 3069 and contended that whether the employees should be offered the option to opt for the Pension Scheme or to continue with the old Contributory Provident Fund Scheme is exclusively a matter of executive policy and no directions can be given to formulate a policy if the Corporation in its wisdom and having regard to its financial conditions has decided not to implement the Pension Scheme.

12. Appearing for the respondents Nos. 1 and 2, learned Assistant Government Pleader Mr. N.D. Gohil

adopted the arguments of Mr. K.M.Patel for the Corporation and has submitted that the petition should be rejected, being devoid of any merits.

13. Before I proceed to deal with the rival contentions, it would be useful to notice at this stage the exact nature of the two Resolutions dated 27.1.1994 and 23.10.2002 passed by the respondent No.3 Corporation, which has given rise to a lengthy debate in this matter. In the Board meeting held on 27.1.1994, following Resolution was passed:-

"1(b) Introduction of Pension Scheme in the Corporation in lieu of Contributory Provident Fund by the Corporation.

Board perused the brief note on the above item along with details of the pension scheme placed before Board on 3.6.1993 and decided to introduce the pension scheme on the lines of the scheme of the State Government w.e.f 1.4.1993, subject to approval/concurrence of State Government and IDBI, respectively by passing the following resolution.

RESOLVED THAT the Pension Scheme for employees of the Corporation be and is hereby adopted w.e.f 1.4.1993 on the lines of the pension scheme prevailing in the State Government, subject to approval/concurrence of State Government and IDBI respectively.

Further resolved that the employees who are in services of the Corporation as on 1.4.1993 shall be allowed to exercise option either to continue with CPF or to join the proposed pension scheme. The employees who join the services of the Corporation after 1.4.1993 will have to join pension scheme compulsorily.

FURTHER RESOLVED THAT the amendment/modifications in the pension rules promulgated by State Government from time to time shall apply mutatis mutandis as if such provisions are incorporated in the Pension Scheme adopted by the Corporation.

FURTHER RESOLVED THAT the Managing Director be and is hereby authorised to take necessary action to implement the said scheme and is also hereby authorised to get necessary

approval/concurrence of the State Government and IDBI, respectively and make consequential amendments in the Provident Fund Regulations."

14. For passing the resolution for revocation of the earlier Resolution dated 27.1.1994, a note was prepared on 17th October, 2002 and placed before the Board of Directors of the respondent Corporation. It would be useful to record the contents thereof to properly appreciate the background leading to the subsequent Resolution dated 23rd October, 2002 being passed. The Note in question reads as follows:-

"The proposal with regard to introduction of the Pension Scheme was submitted to the Board at its meeting held on 27.1.1994 under Item No.C-1(b), a copy of the Board note is enclosed at Annexure "A". Board perused the brief note on the above item and decided to introduce the Pension Scheme on the lines of the scheme of the State Government w.e.f 1.4.1993, subject to approval/concurrence of State Government and IDBI, respectively by passing the necessary resolution. A copy of the Board resolution is enclosed at Annexure "B".

Thereafter, the matter was referred to the State Government and IDBI for due approval vide the Corporation's letter dated 8.2.1994 and 9.2.1994 respectively, copies of the said letters are enclosed at Annexure "C". The Corporation's correspondence with IDBI is enclosed at Annexure "D". IDBI has advised the Corporation to obtain State Government's approval first for the scheme proposed by it. However, the matter has been stuck up at the State Government and till now the matter is pending with the State Government and our efforts to have movement in this regard have been failed. The said resolution has not been implemented thus far.

At this stage now matter is required to be reviewed. The Corporation has either to implement the Pension Scheme after the approval/concurrence of the State Government and IDBI or to recall the Board resolution dated 27.1.1994. The Corporation cannot keep it pending undecided for a long time.

Though the Board of Directors of the Corporation had passed resolution on 27.1.1994 approving to

introduce pension scheme for its employes, the same was subject to the approval/concurrence of the State Government and IDBI. The State Government has not granted approval to the proposal of introduction of Pension Scheme nor the IDBI granted approval. The Corporation being a Financial Corporation established under the provisions of the State Financial Corporations Act, 1951, the Board had passed resolution of approving introduction of Pension Scheme subject to the approval/concurrence of the State Government and IDBI as required by Section 48 of the said Act. However, the IDBI did not grant concurrence and advised the Corporation to seek approval of IDBI only after the State Government grants approval to the proposal of introduction of Pension Scheme as per their letter dated 22.4.1994. On the other hand the State Government till date has not communicated any approval. Thus, the conditions on which the Board had passed resolution approving introduction of Pension Scheme are not satisfied.

The employees hitherto been governed by the Contributory Provident Fund and not pension. With the passage of time, the situation has now drastically changed. The Corporation has been incurring huge losses and is not in a position to bear the burden of Pension Scheme if introduced. The Corporation has incurred losses of Rs. 100.80 crores for the financial year 2000-2001. A further loss of Rs. 126.85 crores has been incurred by the Corporation in the financial year 201-2002 and the provisional loss of the first quarter from 1.4.2000 to 30.6.2002 of present financial year is approximately Rs. 51.18 crores. About 95 employees have retired between 1.4.1998 to 31.7.2002. If the Pension Scheme is to be introduced at this stage, the recurring burden of pension for those 95 employes who have already retired between 1.4.1993 to 31.7.2002 will come to Rs. 2,25,89,228/- per annum (Annexure "E"). The pension liability per annum in respect of those 159 employes due for retirement in the next five years will be approximately Rs. 6,59,27,633/- (Annexure "F"). The Corporation having regard to the heavy losses incurred by it is not at all in a position to bear the burden of pension liability introduced. Therefore, having regard to the changed situation, the Corporation is not in a position

to implement the Pension Scheme.

A forum of retired employees/officers of GSFC has filed Special Civil Application No. 6715/2002 against (1) State of Gujarat - Finance Department (2) State of Gujarat - Industries & Mines Department and (3) Managing Director, Gujarat State Financial Corporation before the Hon'ble High Court of Gujarat. The petitioner has prayed for - GSFC be directed to immediately implement the resolution passed by the Board of Directors dated 27.1.1994 and give benefit of pension scheme to all the retired employees w.e.f. 1.4.1998. GSFC has filed reply to the said petition before the Hon'ble High Court. The matter is pending for hearing on admission stage. The Hon'ble High Court of Gujarat has not granted any interim relief to the petitioner or any directives to the State Government and GSFC.

The forum of GSFC officer's Association had a long pension demand of introduction of the Pension Scheme. However, it is observed that the majority of the employees do not favour the Pension Scheme since the Contributory Provident Fund Scheme which prevails in the Corporation is much more attractive and lucrative than the Pension Scheme and, therefore, at present the GSFC staff Union representing a large number of "B" and "C" Class employes is not interested in the Pension Scheme.

It would be seen from the above that the Corporation is not in a position to implement the Pension Scheme. The Board may, therefore, kindly consider the matter suitably to recall the Board resolution dated 27.1.1994 with regard to introduction of Pension Scheme in the Corporation in lieu of Contributory Provident Fund by the Corporation. If the above proposal is considered suitably by the Board, we will inform the State Government and IDBI accordingly."

15. On the basis of the said note placed before the Board of Directors of the Corporation in its meeting held on 23rd October, 2002, the Board adopted the following resolution:-

"Item No.C-1(c) Revocation of Board Resolution dated 27.1.1994 item No. C-1(b) Introduction of Pension Scheme in the Corporation in lieu of

Contributory Provident Fund by the Corporation.

Board perused the detailed note on the above item along with details of the Pension Scheme placed before the Board on 27.1.1994 and after due deliberations decided to revoke the earlier decision of proposing a Pension Scheme in lieu of Contributory Provident Fund and adopted the following resolution:

RESOLVED THAT the Board Resolution dated 27.1.1994 in Item No. C-1(b) be and is hereby revoked with immediate effect since very conditions of approval/concurrence from the State Government and IDBI are not satisfied and the majority of the employees do not favour the Pension Scheme as the existing Contributory Provident Fund Scheme in the Corporation is much more attractive and lucrative than the Pension Scheme. Therefore GSFC Staff Union representing a large number of "B" and "C" Class employees is not interested in the pension scheme.

Further resolved that the State Government and IDBI be informed accordingly about revocation of the said resolution."

16. Having thus noted the above Resolutions, it would be useful to take note of some of the statutory provisions to be found in the said Act.

From the statement of objects and reasons for enacting the said Act it can be seen that in order to provide medium and long term credit to industrial undertakings, which falls outside the normal activities of commercial banks, Central Industrial Financial Corporation was set up under the Industrial Finance Corporation Act, 1948. The State Governments wished that similar Corporations should also be set up in the States to supplement the work of the Industrial Finance Corporation. The intention was that the State Corporation will confine their activities to financing medium and small scale industries and will as far as possible, consider only such cases as are outside the scope of the Industrial Finance Corporation.

Section 3(1) of the said Act provides that the State Government may, by notification in the Official Gazette, establish a Financial Corporation for the State. Sub-section (2) of the said Section 3 provides that the Financial Corporation so established shall be a body

corporate having perpetual succession and a common seal and shall have power subject to the provisions of the Act to acquire and hold and dispose of property.

Section 9 of the Act provides for the general superintendence, direction and management of the affairs and business of the Financial Corporation shall vest in the Board of Directors.

Section 10 of the Act provides for the constitution of the Board of Directors.

Section 23 of the said Act provides for the Officers and other employees of the Corporation and reads as under:-

"23. Officers and other employes of the Corporation . - The Financial Corporation may appoint officers, advisers and employees as it considers necessary for the efficient performance of its functions, and determine, by regulations, their conditions of appointment and service and the remuneration payable to the.

Provided that the State Government may in consultation with and after obtaining the advice of the Development Bank specify the class or categories of posts in respect of which appointments may be made by the Board on such remuneration and other conditions of service as the Board may determine and no regulation made under this Act shall apply to such posts in respect of matters so determined by the Board."

Section 24 of the said Act provides that the Board in discharge of its functions under the Act, shall act on business principles, due regard being had by it to the interests of the industry, commerce and general public.

Section 25 of the said Act provides for the business which financial Corporation may transact and includes inter-alia the business of guaranteeing on such terms and conditions as may be agreed upon, loans raised by the industrial concerns, guaranteeing on such terms and conditions deferred payments due from the industrial concerns in connection with purchase of capital goods within India, under-writing of the issue of stock, shares, bonds or debentures by industrial concerns and such other businesses as specified in the said Section 25 of the Act.

Section 28 of the said Act specifies certain businesses which are prohibited for the State Financial Corporation .

Section 39 of the said Act provides for the power of the State Government to give instructions to the Financial Corporation on questions of policy. Section 39 reads of the said Act reads as under:-

"39. Power to give instructions to Financial Corporation on questions of policy. -- (1) In the discharge of its functions, the Board shall be guided by such instructions on question of policy as may be given to it by the State Government and after obtaining the advice of Development Bank.

(2) If any dispute arises between the State Government and the Board as to whether a question is or is not a question of policy, the decision of the State Government shall be final.

(3) If the Board fails to carry out the instructions on the question of policy laid down by the State Government under sub-section (1) of this section or the instructions given to the Board under sub-section (4) of section 37A, the State Government shall have the power to supersede the Board and appoint a new Board in its place to function until a properly constituted Board is set-up and the decision of the State Government as to the grounds for superseding the Board shall not be questioned in any Court."

Section 48 of the said Act provides that the Board may, after consultation with the Bank (which at the relevant time was Reserve Bank of India, later on by amendment was changed to Industrial Development Bank of India and thereafter by yet another amendment was changed to Small Industries Bank) and with previous sanction of the State Government, make Regulations not inconsistent with the Act and the Rules made thereunder, to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Sub-section (2) of Section 48 provides that without prejudice to the generality of the foregoing powers, such regulations may provide for the subjects specified therein. Relevant portion of Section 48 reads as under:-

"48. Power of Board to make regulations.-- (1) The Board may, after consultation with the Development Bank and with the previous sanction of the State Government, make regulations not inconsistent with this Act and the rules made thereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such regulations may provide for--

(a) xxx xxx xx
(b) xxx xxx xx

(k) the establishment and maintenance of provident or other benefit funds for employees of the Financial Corporation;"

17. Having thus noted the factual background as also the statutory provisions, I would now like to deal with the preliminary contentions raised by Mr. K.M. Patel before proceeding to deal with the matter on merits.

18. Mr. K.M.Patel's first contention with respect to the locus-standi of the unregistered Association to file the petition is to be recorded only for being rejected. Admittedly the petitioner No.2 is an ex-employee of the Corporation having retired on superannuation and he is also joined himself in his personal capacity. In that view of the matter the petition cannot be thrown out on the ground of want of locus-standi.

19. With respect to the contention of delay and laches also, I find that the petitioners had made several representations to the respondent No.3 for implementation of the Pension Scheme as envisaged in its Resolution dated 27.1.1994. This Court had noted in the earlier portions of this judgement that number of attempts had made by the petitioners before filing the petition, but the respondent No.3 had not replied to any of these representations. From the petition as well as from the rejoinder affidavits filed by the petitioners, it is clear that at all stages the employees had kept the issue alive and have been agitating, representing and persuading the respondent No.3 Corporation to effectively implement the Pension Scheme as proposed in the Resolution dated 27.1.1994. It is therefore, not be

possible for me to reject the petition solely on the ground of delay and laches.

20. With respect to the contention of the learned Counsel for the respondent No.3 regarding acquiescence also, I find that the employees who had retired have been collectively representing their cases for grant of pension pursuant to the resolution dated 27.1.1994 and have been clamouring for the implementation of the pension scheme. The fact that they retired at the relevant time and accepted the provident fund benefits cannot be a factor to non-suit the petitioners on the ground of acquiescence. It is the specific case of the petitioners that pension scheme had already come into operation upon adoption of the Resolution dated 27.1.1994 and that therefore, they were entitled to receive pension upon retirement. If the petitioners therefore succeed in establishing that a validly constituted pension scheme was already brought in to existence, they would have a vested right to opt for pension scheme and receive pension. Thus if petitioners succeed in demonstrating that the retired employees had a right to receive pension, the respondents cannot be permitted to urge that the employees have waived such a right. The cases of those retired employees who have opted for and accepted benefits under the voluntary retirement scheme however, stand on a different footing. As held by the Hon'ble Supreme Court in the case of A.K. Bindal & anr. Vs. Union of India and ors. reported in (2003) 5 SCC 163, once the person accepts voluntary retirement and accepts all attendant benefits available thereunder, it is not open to such an employee to turn down and claim pensionary benefits pursuant to the scheme.

21. Having thus crossed the threshold, the Court may now divert attention to the contentions raised by the rival parties. Here also before dealing with more contentious issues, I would like to first focus my attention to the rival submissions with respect to the question of financial constrains in introduction of Pension Scheme.

22. As recorded earlier, learned Counsel Ms. Ketty Mehta for the petitioners has canvassed that the Pension Scheme having been introduced by the Corporation, subsequent deterioration in the financial condition of the Corporation would not permit the Corporation to withdraw the Scheme with retrospective effect. In other words, if the petitioners had existing legal rights to claim pension, financial constrains would not be a valid defence to deny them such benefits. On the other hand I

have noted that Mr. K.M. Patel for the Corporation has been agitating that financial capacity of the employer is a valid consideration and no directions can be given without having regard to the capacity of the employer to absorb the additional burden flowing from implementation of a pension scheme. In my view, both Advocates are substantially correct in their submissions. In view of the decisions of this Court dated 10.3.2004 in Letters Patent Appeal No. 1134 of 1997 (Karshanbhai K. Rabari Vs. State of Gujarat) as well as the decision dated 31.7.2001 passed by the Division Bench in Letters Patent Appeal No. 788 of 1998 (State of Gujarat Vs. Kusumben E. Borasada), it cannot be gain-said that if an employee has an existing legal right, financial constraints cannot be a valid defence to deny such benefits to him. The same view has also been taken by the learned Single Judge of this High Court in the decision in Deva Gova Vs. District Panchayat, reported in 2004 (2) GLH 273 and in Gujarat State Khadi Gramodhyog Board Pensioners Association Vs. Gujarat State Khadi Gramodhyog Board reported in 2004 (1) GLH p.18.

23. I also find force in the submission of learned Counsel Mr. K.M. Patel that if a pension scheme is to be introduced for the first time, financial capacity of the employer is a very valid consideration and this Court cannot give any direction to formulate a pension scheme without having regard to the capacity of the employer to absorb additional burden flowing therefrom. This is the consistent view taken by the Hon'ble Supreme Court in number of decisions. In addition to the decisions cited by Mr. Patel in this regard, namely AIR 1992 SC 789 (Delhi Development Horticulture Employees Union Vs. Delhi Administration), 2000 (3) GLH 409 (Abad Dairy Vs. Manjibhai Dhanjibhai), the Hon'ble Supreme Court in the case of Officers & Supervisors of I.D.P.L. Vs. Chairman & M.D I.D.P.L & ors. reported in 2003 (6) SCC p. 490, has observed that financial capacity of the employer is an important factor for implementation of pay revision and sick Government company continuously incurring losses cannot be asked to implement the pay revision by directing the Government to weigh the additional expenditure involved. In the decision of the Hon'ble Supreme Court in T.N. Electricity Board Vs. R. Veerasamy & ors., reported in (1999) 3 SCC 414 also, the apex Court was pleased to uphold the decision not to extent the benefit of the pension scheme to those employees who had retired prior to a certain date and observed that the financial constraints which were beyond the means of the Board were a valid reason for introducing the scheme prospectively.

24. It is not necessary to list the long line of decisions of the Hon'ble Supreme Court taking this consistent view. Suffice it to say that while considering the questions of pay revision or implications of pension scheme, it is not possible to disassociate the question from financial implications and the capacity of the employer to weigh additional burden pursuant to any such scheme. This however, does not conclude the issue arising in the petition.

25. Having thus cleared the decks, I would now like to address the core issue involved in this petition. The pivotal question which requires to be answered is whether by resolution dated 27.1.1994, the respondent No.3 Corporation had implemented the pension scheme as contended by the learned Counsel for the petitioners or whether the learned Counsel for the Corporation is correct in submitting that the necessary condition of approval/concurrence of the State Government and IDBI not having been fulfilled, the pension scheme was never effectively implemented. To answer this question, a subsidiary question that needs to be answered is whether the condition of seeking necessary approval/concurrence of the State Government and IDBI was an invalid condition as suggested by the learned Counsel for the petitioners or whether such an approval/concurrence was necessary or at least permissible under the provisions of the Act as canvassed by the Counsel for the Corporation.

26. I have noted that learned Counsel for the petitioners relying upon the Rajasthan High Court judgement dated 5th September, 1998, has submitted that question of payment of pension to the employees of the Corporation is not a policy decision and that therefore, it was not possible for the Corporation to seek any approval/concurrence from the State Government or IDBI before introducing the pension scheme. She has therefore submitted that the condition of seeking approval/concurrence from the State Government is a redundant condition in the Resolution dated 27.1.1994.

27. From the perusal of the decision of the Rajasthan High Court judgement dated 5.9.1998, I find that the question involved in the said petition was with respect to the payment of 20% ex-gratia payment which practice was going on since number of years and which was sought to be stopped by the State Government in purported exercise of powers under Section 39 of the said Act. The Rajasthan High Court, finding that such powers could not have been exercised by the State Government since such a

payment did not involve a policy decision, was also pleased to observe, in my view as a obiter, that to decide the fixation of grades, creation of posts and matter relating to emoluments, pension, gratuity etc. cannot be said to be a policy matter.

28. In the decision of the Karnataka High Court in the case of Dr. Y.B.Yalwar Vs. State of Karnataka & ors. reported in II (1997) BC p. 265, reliance upon which has been placed by the learned Counsel for the petitioners, I find that the question involved therein was of payment of Rs. 1500/- by way of special pay to an employee which was sought to be objected to by the State Government, in which factual background the Karnataka High Court was pleased to observe that Sections 23 and 48 of the said Act do not empower the State Government to interfere with the payment of special pay to the concerned employee. In my view the above decision of the Karnataka High Court also would not conclude the controversies involved in the present petition.

29. In the decision of the Hon'ble Supreme Court in State of Maharashtra & ors. Vs. Dr. Hari Shankar Vaidhya & anr. reported in (1997) 9 SCC p.521, the apex Court was pleased to observe that whether a pension or a gratuity scheme should be extended to the educational institutions is a question of an executive policy and the Court would not take the responsibility of directing the Government to extend the policy.

30. Despite the passing reference in the Division Bench decision dated 5.9.1998 of the Rajasthan High Court in the aforesaid case, I am unable to persuade myself to accept the contention of the learned Counsel for the petitioners, especially in view of the observations of the Hon'ble Supreme Court in the above decision of State of Maharashtra Vs. Dr. Hari Shankar Vaidhya (supra), that whether to introduce a pension scheme or not is not a policy decision.

31. The question however, that remains to be answered is whether the introduction of the pension scheme is such a policy decision with respect to which the State Government can give instructions to the Corporation under Section 39 of the said Act. I have noted the provisions of Section 39 in which sub-section (1) of Section 39 provides that in discharge of its functions, the Corporation shall be guided by such instructions on questions of policy as may be given to it by the State Government. Even while holding that the question of introduction of a pension scheme involved a policy

decision and was therefore a question of policy, is it such a policy which can be termed to be in discharge of the functions of the Corporation? From the provisions of the Act, as noted above, it has been seen that the Act specifies the sphere within which the Corporation should function. It has outlined the businesses that the Corporation can transact. The Act also provides for the businesses that the Corporation shall not transact. In view of these provisions the term "in discharge of its functions" has to be interpreted to mean such functions for which the Corporation is created. For the purpose of its smooth function, undoubtedly the Corporation would require competent manpower. Thus, engaging and employing officers for the Corporation and laying down their service conditions including emoluments to be paid would certainly be an important task of man management to be carried out by the Corporation to ensure that the Corporation functions smoothly and is able to discharge its functions for which it is established. The question of personnel management however, by no yardstik can be considered as a function for which the Corporation is established, and in that sense it is not possible to construe that laying down service conditions for the employees of the Corporation would be such a policy with respect to which the State Government would be in a position to give instructions to the Corporation, since it is not in discharge of its functions that such instructions on questions of policy are being given by the Government. To put it differently, the Government is empowered to give instructions regarding the questions of policy only when it involves any of the functions for which the Corporation is established. I therefore hold that formulation of the pension scheme was not such a question of policy with respect to which the State Government could have given instructions in exercise of powers under Section 39(1) of the Act.

32. The question of entitlement of the employees to receive pension however requires to be viewed from a different angle.

As stated above, the real question is whether the condition of seeking approval/concurrence from the State Government and Industrial Development Bank of India were valid conditions in the Resolution dated 27.1.1994.

In Section 23 of the said Act, it is provided that the Corporation may appoint such officers, advisors and employees as it considers necessary for the efficient performance of its functions and determine by Regulations their conditions of appointment and service and

remuneration payable to them. Thus, the conditions of appointment and service of the employees of the Corporation are to be governed by framing Regulations. Whether to be governed by the Contributory Provident Fund Scheme or to be governed by the Pension Scheme is an important service condition of an employee of the Corporation. If the pension scheme is one of the conditions sought to be introduced as a service condition by the Corporation, it was necessary that the same be introduced by framing of the Regulations as required under Section 23 of the Act. I am unable to accept the contention of the learned Counsel for the petitioners that the word "may" used in Section 23 of the Act empowers the Corporation to lay down and change service conditions even without framing of Regulations. The term "may" has been used to permit the Corporation to appointment such officers, advisors and employees as found necessary and not to dispense with the requirement of framing of Regulations laying down conditions of appointment and service and remuneration payable to the officers, advisors and employees so appointed by the Corporation.

33. In view of this discussion, I find that the pension scheme could not have been introduced without framing of the Regulations under Section 48 read with Section 23 of the said Act. In that view of the matter, I am unable to accept the contention of the learned Counsel for the petitioners that by merely adopting the Resolution in its meeting held on 27.1.1994, the Corporation in effect brought into existence a Pension Scheme without any further requirement being fulfilled. Seen from this light, the condition of seeking prior approval/concurrence of the Government cannot be termed as an invalid condition nor can it be categorised as a redundant condition.

34. There is yet another reason why I find that the Pension Scheme was never brought into existence.

I have noted above that the employees of the Corporation were hitherto governed by the Contributory Provident Fund Scheme. It is not in dispute that the said Contributory Provident Fund Scheme was in operation having been formulated through the Regulations framed by the Corporation in exercise of powers under Section 48 of the said Act. The Employees Provident Fund Regulation, 1961 so framed provided for creation of a fund and a compulsory membership subscription of all employees of the Corporation. The Regulation made detailed provisions with respect to the working of the Contributory Provident

Fund Scheme and also required the employer to make matching contribution in the Provident Fund Account of the employee. When the new Pension Scheme was sought to be introduced as envisaged in the Resolution dated 27.1.1994, it could not have been done without framing proper Regulations under Section 48 of the said Act, since introduction of the Pension Scheme would have necessitated substantial modifications in the existing Contributory Provident Fund Scheme and partial amendments in the Provident Fund Regulations, 1961. Such modifications and amendments could not have been validly brought into effect without framing the Regulations in exercise of powers under Section 48 of the said Act. In fact, the Resolution dated 27.1.1994 also envisaged making of consequential amendments in the Provident Fund Regulations. Under Section 48 of the said Act, the Board of Directors of the Corporation, after consultation with the specified Bank and with previous sanction of the State Government, is empowered to make Regulations not inconsistent with the Rules and the Act made thereunder. Thus, framing of any such Regulations would have required the necessary approval/concurrence of the State Government. On this ground also I do not find that the condition to seek a prior approval/concurrence of the State Government was an invalid and inoperative condition.

35. Thus, on the twin ground of the Pension Scheme not having been introduced through framing of the Regulations and the existing Contributory Provident Fund Scheme could not have been modified otherwise than having recourse to the powers under Section 48 of the said Act, I find that the condition of seeking prior approval/concurrence of the State Government was a valid condition. Thus, on the ground of non-fulfilment of the necessary conditions envisaged under the Resolution dated 27.1.1994, and also on the ground that no pension scheme could have been formulated without framing proper Regulations in exercise of powers under Section 48 of the said Act, nor could the existing Contributory Provident Fund Scheme been modified or amended in absence of any Regulations, I find that by merely passing the Resolution on 27.1.1994, no Pension Scheme was brought into existence.

36. To conclude, I am of the opinion that petitioners are not entitled to receive the benefits of the Pension Scheme as if the same was brought into existence by Resolution dated 27.1.1994. The said Resolution having been subsequently withdrawn without the Pension Scheme ever having been brought into existence, the employees of

the Corporation have not established existence of any legal rights to be covered under any Pension Scheme.

37. In view of the above conclusion, the question of retrospective operation of the withdrawal of the Resolution dated 27.1.1994 by subsequent Resolution dated 23rd October, 2002 and its legal effect is not necessary to be debated and decided any further.

38. It is also not necessary for me to dilate any further on the question of the rival contentions regarding financial position of the Corporation at the relevant time .

39. In the result, I find that the petitioners have not made out any case for seeking mandamus as prayed for in the petition and the petition is therefore, hereby rejected. Rule is discharged with no order as to costs.

(Akil Kureshi, J.)

*/Mohandas